The Courier-Journal, a Division of Gannett Kentucky Limited Partnership *and* Communications Workers of America, Local 3310, AFL–CIO. Case 9–CA–39958

September 22, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 10, 2003, Administrative Law William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally increasing unit employees' contributions for healthcare insurance and by failing and refusing to furnish the Union with relevant information at the Union's request. For the reasons discussed below, we reverse those findings.

1. Unilateral changes

a. Facts

The Respondent publishes and distributes the Courier-Journal, a daily newspaper based in Louisville, Kentucky. The Union represents the Respondent's five composing room employees.

The parties' most recent collective-bargaining agreement expired on August 18, 1999. At the time of the hearing, the parties had not concluded a successor agreement, reached a bargaining impasse, or agreed to extend the contract.

The expired contract provided that

> The Company agrees to continue in effect for the duration of this Agreement a program of health insurance plans on the same terms as are in effect for employees not represented by a labor organization. Any changes (benefits and premiums) in such plans shall be on the same basis as for non-represented CJ employees.

Pursuant to this provision, the Respondent made numerous unilateral changes in both represented and nonrepresented employees' health insurance costs and benefits during the term of the contract. After the contract expired, the Respondent unilaterally increased employee contributions effective July 1, 2000, July 1, 2001, January 1, 2002, and January 1, 2003. The Union did not protest the changes until it filed a charge on January 29, 2003.

The judge found that the Respondent violated Section 8(a)(5) by raising employee contribution rates in January 2003 without affording the Union an opportunity to bargain. He reasoned that employee contribution rates are a mandatory subject for bargaining and that the Union had not, by agreeing to the contract provision quoted above, waived its right to bargain over changes in those rates after the contract expired. He also rejected the Respondent's contention that the contract provision, together with the Respondent's history of unilaterally changing health care costs and benefits without protest from the Union, established a practice that the Respondent was entitled to continue. We disagree.

b. Analysis

For the reasons discussed in a companion case, *Courier-Journal*, 342 NLRB No. 113 (2004) (*Courier-Journal I*), we find no violation of Section 8(a)(5) here. There, as here, the Respondent's collective-bargaining agreement (with a different union) authorized the Respondent to change the costs and benefits of the health care plan for bargaining unit employees unilaterally, on the same basis as for nonrepresented employees. There, as here, the Respondent made numerous unilateral changes in the health care plan, both during the term of the agreement and during the hiatus periods between contracts, without opposition from the Union. In these circumstances, we find, as we did in *Courier-Journal I*, that the Respondent's practice has become an established term and condition of employment, and therefore that the Respondent did not violate Section 8(a)(5) when it acted consistently with that practice by making further unilateral changes.

2. Information request

a. Facts

The Respondent is building a new production facility. When the project is completed in September 2004, all jobs in the composing room unit will be eliminated. At that point, three of the five unit employees are expected to retire, and the other two will be assigned to other departments. Recent negotiations have concentrated on both early retirements and transfers for the unit employees.

On August 7, 2001, the Union requested information from the Respondent, including a list of all departments, copies of all current job descriptions, and lists of current represented and non-represented employees. The Union repeated its request on January 30, 2002.[1] When the Respondent refused the request, the Union filed an unfair labor practice charge. On May 7, the Regional Director approved a settlement agreement, under which the Respondent would provide the Union with most of the requested information. Information related to jobs, however, was limited to "non-represented employees in jobs to which composing room employees might reasonably be expected to be transferred or to employees who may reasonably be expected to perform work currently performed by composing room employees."

On May 23, the Respondent gave the Union a list of all departments, job descriptions, and information regarding employees in the ad services and the on-line (internet) departments. The Union did not object that the Respondent had assertedly failed to provide agreed-upon information or otherwise failed to comply with the terms of the settlement agreement. On July 18, the Regional Compliance Officer closed the case.

Some time later, Union President Joanne Smith learned that composing room employees had previously transferred to departments other than ad services or internet. On October 23, the Union wrote to the Respondent stating that relevant information had been omitted from the Respondent's May 23 response. The letter requested additional information, including descriptions of the technology and news departments, job descriptions for the technology, news and circulation departments, and a list of all represented and nonrepresented employees in those departments, along with their dates of hire, pay rates, job classifications, and addresses and telephone numbers. The Respondent refused those requests, stating that it had complied with the settlement agreement. The Union reiterated its request on October 26, explaining that, on the basis of past experience, its members might be transferred to the above departments. On November 19, the Respondent provided a description of the work performed by the technology and news departments. However, it refused to provide the rest of the requested information, asserting (among other things) that it had complied with the settlement agreement and that ad services and internet were the "only reasonable matches" for the composing room employees.

The judge found that, except for the names, addresses, and telephone numbers of the nonunit employees, the requested information was relevant and should have been produced. He rejected the Respondent's argument that, in making its October 23 request, the Union was attempting to relitigate the prior unfair labor practice charge, because he found that "there was no litigation. . . . There was a settlement." Accordingly, he found that the Respondent had violated Section 8(a)(5) by refusing to provide the remaining information. We disagree.

b. Discussion

The Board's policy favoring the peaceful resolution of disputes without litigation, inter alia, through settlement agreements, is too longstanding and well established to require extensive comment. As the Board observed in *Independent Stave Co.*, 287 NLRB 740 (1987), "The purpose of such attempted settlements has been to end labor disputes, *and so far as possible to extinguish all the elements giving rise to them*." Id. at 741, quoting *Wallace Corp. v. NLRB*, 323 U.S. 248, 254 (1944) (emphasis added). Indeed, if it could not dispose of the majority of cases without recourse to litigation, through informal mechanisms including settlements, the Board simply could not function effectively. See *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740, 742 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952). See also 67 NLRB Annual Report 8 (2002) (in FY 2002, of 30,398 unfair labor practice cases closed, 35.5 percent were settled or otherwise adjusted before issuance of administrative law judges' decisions).[2]

This policy can be effective, however, only if it brings closure to the settled disputes and repose to the parties. That means that, once their disputes have been finally settled, parties should not be able to circumvent settlement agreements by later attempting to revive those disputes.

That is precisely what the Union has attempted to do here. On May 23, pursuant to the settlement agreement, the Respondent produced much of the information that the Union had previously requested. The Union had ample opportunity to inspect the information and, if it deemed the information incomplete, to make its objections to the Regional Office before the case closed. It failed to do so. Thus, on July 18, the Region closed the case—without opposition by the Union. At that point, the dispute was effectively at an end. Nevertheless, some 3 months *after* the case was closed, the Union

[1] All dates hereafter are 2002.

[2] See also NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings Sec. 10124.1 ("It is the policy of the Board and the General Counsel to actively encourage the parties to reach a mutually satisfactory resolution at the earliest possible stage. . . . Settlement of a meritorious case is the most effective means to: (1) improve relationships between the parties; (2) effectuate the purposes of the Act; and (3) permit the Agency to concentrate its limited resources on other cases by avoiding costly litigation expenses.")

sought to revive the dispute, contending for the first time that the information the Respondent had turned over was incomplete.

We find that, in renewing the original information request and pursuing this litigation, the Union and the General Counsel are, in effect, attempting to resurrect the original dispute, which was disposed of through the settlement agreement. In our view, these actions cannot be squared with the salutary policy of affording finality to the informal settlement of such disputes. We therefore dismiss this allegation.[3]

Our colleague argues that the request of October 23 was a new request. It was not. The Union said on October 23 that certain information had been omitted from the Respondent's May 23 supply of information. That supply of information was pursuant to the settlement agreement in the prior case. (Case 9–CA–39048) If the Union thought that the omission of information was contrary to the settlement, it should have protested the closure of that case.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 22, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

For the reasons set forth in my dissent in *Courier-Journal*, 342 NLRB No. 113 (2004), I agree with the judge that the Union did not waive its right to bargain over postcontract expiration changes in employee health benefits and costs, and therefore that the Respondent's unilateral changes in those conditions violated Section 8(a)(5).

I also find that the Respondent violated Section 8(a)(5) by failing and refusing to provide the Union with information it requested on October 23, 2002, including (at least) descriptions of the Respondent's technology and news departments and job descriptions for the technology, news, and circulation departments. As the judge found, that information was relevant and necessary for the Union to evaluate employment options available to employees in the composing room when their current jobs are eliminated.

My colleagues dismiss the information allegation. They point out that a previous charge had been settled several months before, when the Respondent promised to provide such information, and that although the Respondent did not include this information with the information it did provide, the Union failed to protest and the Regional Office closed the case. Accordingly, they find that the Union, by making its October request, is attempting to resurrect a settled dispute.

Like the judge, I disagree. Neither the General Counsel nor the Union contends that the Respondent's previous failure to furnish information, which was the subject of the settlement agreement, was unlawful. The only allegedly unlawful failure to provide information is the Respondent's refusal in response to the Union's *new* request. This, in my view, constitutes a separate violation of the Act, and is not simply an attempt to revive the settled charge.

The Union has never agreed that it was *not* entitled to the information requested. Even if the Union was careless in failing to inspect the information received pursuant to the settlement, it was legally entitled to this information. The information remains relevant, and the Union has made a good-faith request for it. Arguably, the General Counsel, in the exercise of his prosecutorial discretion, could have chosen not to issue a complaint over the new failure to provide the information, based on his decision to close the earlier case and the Board's policy of affording finality to settlement agreements. But the General Counsel similarly had the discretion to proceed, based on his determination that there was reasonable cause to believe that the Act had been violated. The Board should defer to the General Counsel's decision to proceed. On the merits, in turn, I see no reason not to find the clear violation based on the new information request. I therefore dissent.

Dated, Washington, D.C. September 22, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[3] We do not mean to imply that, having once made an information request that is ultimately disposed of in a settlement agreement, a union is forever foreclosed from requesting any of the requested information that may not have been furnished pursuant to the agreement. We recognize that, if circumstances change subsequent to the agreement, the union may be warranted in seeking the information a second time. The Union makes no such argument here, however.

Kevin P. Luken, Esq. and *Deborah Jacobson, Esq.,* for the General Counsel.[1]
William A. Behan, Esq., for the Respondent.[2]
Joanne Smith, President, for the Charging Party.[3]

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial in Louisville, Kentucky, on July 16, 2003. The case originates from a charge, filed by the Union on January 29, 2003, and amended on February 12, 2003, against The Courier-Journal, a Division of Gannett Kentucky Limited Partnership the Newspaper. The prosecution of this case was formalized on March 27, 2003, when the Regional Director for Region 9 of the National Labor Relations Board (Board), acting in the name of the Board's General Counsel, issued a complaint and notice of hearing (complaint) against the Newspaper.

The complaint alleges the Newspaper violated Section 8(a)(5) and (1) of the Act when on or about November 11, 2002, it failed and refused to furnish the Union certain specific information the Union had requested in writing on or about October 23, 2002.[4] It is alleged that the requested information is necessary and relevant to the Union for the purposes of formulating bargaining proposals and for the performance of the Union's duties as exclusive bargaining representative for an appropriate unit of employees.[5] It is also alleged the Newspaper instituted new health insurance premiums for unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Newspaper with respect to this conduct and the effects of this conduct.

The Newspaper admits that the Board's jurisdiction is properly invoked[6] and that the Union[7] is a labor organization within the meaning of Section 2(5) of the Act. The Newspaper denies that it violated the Act in any manner alleged in the complaint. The Newspaper asserts, in its timely filed answer to the complaint, at trial, and in its posttrial brief, that settlement of a prior Board charge, filed by the Union herein, addressed what information the Newspaper would and would not need to furnish to the Union. The Newspaper asserts that it provided all information called for in the settlement agreement and that the Union is simply seeking to revisit that settlement by again requesting the same information. The Newspaper asserts that it was lawfully privileged to institute new health insurance premiums for the unit employees and that it effected the changes, as it had on previous occasions, to preserve the "dynamic status quo." The Newspaper asserts the same changes were made, as called for in the parties' most recently expired collective-bargaining agreement, for the nonrepresented employees as for the unit employees.

I have studied the whole record, the briefs filed by the Government and the Newspaper, and the authorities they rely on. Based on more detailed findings and the analysis below, I conclude and find the Newspaper violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT[8]

I. OVERVIEW

The Newspaper publishes and distributes a daily newspaper in and for greater Louisville, Kentucky. Formerly, the unit was represented by Louisville Typographical Union Number 10, and the parties entered into successive collective-bargaining agreements, the most recent of which was effective from August 19, 1996, to August 18, 1999. On or about September 1, 1996, Louisville Typographical Union No. 10 merged with the Communications Workers of America Local 3310 and became the Union herein. The parties have been in negotiations since the expiration of the most recent agreement but have not reached a new agreement or impasse. The parties have held nine bargaining sessions between June 22, 1999, and October 23, 2002. There have been no bargaining sessions since October 23. In 1999, when the parties commenced negotiations for a new agreement, they began discussing noneconomic issues, but, starting in January 2002, they began negotiating regarding the elimination of the composing room department. Technological advancements are eliminating the work traditionally performed in the composing room. The unit at one time had approximately 180 to 200 employees; however, there are only 5 employees currently in the unit. There is no issue regarding the elimination of the composing room department.

Joanne Smith is president of the Union, and Mike Arnold is shop steward. Wendell J. Van Lare is vice president of labor relations and senior labor counsel for the Newspaper.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Information Request

1. Facts

The Newspaper is currently constructing a state-of-the-art production facility. Upon its completion, scheduled for September 2004, all jobs in the unit will be eliminated. Of the five current unit employees, three are expected to take early retire-

---

[1] I shall refer to counsel for the General Counsel as Government Counsel or the Government.

[2] I will refer to the Respondent as the Newspaper. Counsel for the Newspaper stated at trial that its correct name is as set forth above. The Government, in its brief, has used that designation. This case is, therefore, amended to reflect the correct name of the Newspaper.

[3] I shall refer to the Charging Party Local 3310 as the Union.

[4] All dates are in 2002 unless otherwise indicated.

[5] The Newspaper has recognized the Union as representative of "all journeymen employed in the Newspaper's Composing Room." Based on Sec. 9(a) of the Act the Union has been, and continues to be, the exclusive collective-bargaining representative of the unit employees.

[6] The Newspaper admits that during the 12-month period preceding the issuance of the complaint herein, a representative period, it derived gross revenues in excess of $500,000 and held membership in or subscribed to various interstate news services, including Associated Press (AP) Wire Services. The Newspaper admits, the evidence establishes and I find it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[7] The Newspaper admits, and I find that t he Union is a labor organization with in the meaning of Sec. 2(5) of the Act.

[8] The essential facts are not significantly disputed. Unless I note otherwise, my findings are based on admitted or stipulated facts, documentary exhibits, or undisputed and credible testimony.

ment and two will be assigned to other departments at the Newspaper. All five of the current unit employees have lifetime employment guarantees with the Newspaper. The most recent negotiations have been focused on early retirements or transfers to other departments for the unit employees. On January 30, Vice President Van Lare appeared at negotiations as the chief spokesperson for the Newspaper in order to explain the impact of the new production facility, including specifically the elimination of all unit jobs, and to offer "what we regard as a very attractive [early retirement] program."

On August 7, 2001, the Union made an extensive information request that included requests for a list of all departments and a copy of all current job descriptions. The request was again presented to the Newspaper at the negotiating session of January 30. The Newspaper did not provide the information sought, and the Union filed an unfair labor practice charge. On May 7, the Regional Director for Region 9 approved a settlement agreement between the parties pursuant to which the Newspaper, among other undertakings, agreed to provide a list of all departments and information relating to jobs except that the information relating to jobs was "restricted to non-represented employees in jobs to which composing room employees might reasonably be expected to be transferred or to employees who may reasonably be expected to perform work currently performed by composing room employees." On May 23, the Newspaper provided the list of all departments and job descriptions and related information regarding employees in the Ad Services Department and "on the Internet." The Union made no contemporaneous objection to the Newspaper regarding the scope of its response nor was any objection made to the Region regarding the Newspaper's compliance with the settlement agreement. On July 18, the Region closed the case.

At some point, the record does not disclose when Union President Joanne Smith learned from employees that composing room department employees had, in the past, transferred to departments other than ad services or internet. Shop Steward Mike Arnold, who has worked in the composing room for over 40 years, confirmed that in the 1970's employees had transferred to both the News and advertising departments. Documentary evidence provided by the Newspaper pursuant to subpoena confirms that composing room department employees did transfer to various departments, including the technology, news, and circulation departments.

On October 23, the Union wrote the Newspaper stating that it had reviewed the information provided on May 23, and that "relevant information was omitted and we are, therefore, requesting the following information/data[.]" In separate paragraphs, the Union requests descriptions of the technology and news departments, job descriptions for all positions in the technology, news, and circulation departments, and a list of all represented and unrepresented employees in the foregoing departments together with their dates of hire, rates of pay, job classification, last known address, and telephone number.

In a letter also dated October 23, the Newspaper responded that it had complied with the settlement agreement and declined to provide the information requested.

On October 26, the Union wrote again explaining that, in the past, "members have been transferred to the news, technology and circulation departments. Based on this well known fact it is our reasonable belief that our members might be transferred to these departments." The letter continues stating that the information sought was "requested in good faith in order to represent our members." President Smith testified that the information was being sought in order to give the members "the best options on where they might transfer to."

By letter dated November 19, the Newspaper responded. The response acknowledges that the Union had not previously requested a description of the work performed by the technology and news departments and it provided that information. The Newspaper denied the remainder of the request noting that information regarding employees not in the bargaining unit is not presumptively relevant and that the request sought personal and confidential information regarding nonunit personnel. The response stated that the Newspaper had compiled with the settlement agreement because ad services and the "on-line content position" were "the only reasonable matches" for the employees expected to be transferred.

2. Analysis and concluding findings

The Government argues that the information sought by the Union, although relating to nonunit positions, is relevant "in order to provide unit employees with the most and best options concerning transfer." It further argues that Section 10(b) has no application to the Union's current request for relevant information.

The Newspaper argues that the Union's re-request for information previously sought that resulted in a settlement agreement constitutes "relitigation," that the instant complaint allegation is barred by Section 10(b), and that the information sought is not relevant.

Contrary to the Newspaper's argument regarding relitigation, there was no litigation of the prior unfair labor practice charge. There was a settlement.

Regarding the 10(b) argument, I am aware of no precedent, and counsel for the Newspaper has cited none, that precludes consideration of the relevancy of a timely current request for information that was not provided pursuant to a prior request. See *Providence Hospital*, 320 NLRB 790, 794 fn. 4 (1996). As the Board noted in the factual context of a request for information following an arbitration, "it is by definition not possible to pass on the propriety of requests made in futuro." *Kroger Co.*, 226 NLRB 512, 513 fn. 6 (1976).

The Newspaper is correct in asserting that it is incumbent upon the Union to establish that the information concerning non-unit positions is relevant and necessary. See *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998). Despite this, the Union's burden "is not an exceptionally heavy one, requiring only that a showing be made of a 'probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."' Id., quoting *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

The Union, being aware that unit employees had been transferred to departments and positions other than those identified by the Newspaper, sought job descriptions in the technology, news, and circulation departments. Unit employees have, in the past, been transferred to each of those departments. The job descriptions sought will reflect whether existing positions in the foregoing departments offer viable work opportunities given the skills of the unit employees. Such information will certainly "be of use to the union" in assessing the options open to the remaining unit employees. The Newspaper, in furnishing information pursuant to the settlement, determined the positions to which it believed unit employees most likely would be transferred. The Union is entitled to information that will show whether there are additional positions in the foregoing departments to which its unit members could be transferred as well as the pay rates for each of those positions. By failing to provide the foregoing information, the Newspaper violated Section 8(a)(5) of the Act.

I concur with the Newspaper that identification of the individuals currently holding various job classifications in the foregoing departments, together with their addresses and telephone numbers, is unnecessary for the purposes of evaluating the suitability of those positions with regard to unit employees. I find that the Newspaper is not required to provide that information. Insofar as the complaint alleges a failure to provide all of the information sought by the Union, I shall recommend dismissal of that portion of the complaint relating to the failure to identify the nonunit employees by name and to provide their addresses and telephone numbers.

B. Health Insurance

1. Facts

In October, the Newspaper sent to all of its employees an undated letter signed by Vice President for Employee Benefits Roxanne Horning enclosing a booklet describing the health care benefits that would be available to employees in 2003 and instructing employees upon enrollment procedures. The letter notes that employees must enroll between October 28 and November 15, 2002. The letter further states:

> Please read the enclosed booklet carefully to learn more about Sageo [the plan administrative system], the enrollment process and benefit plan changes effective 2003. For most of the health plans that we offer, you will see that your 2003 employee contribution is increasing from this year's amount. As you are no doubt aware . . . health care costs are escalating at an alarming level . . . and, like other employers, we are finding it necessary to pass along some of the increase to plan participants.

Employee contributions are scaled to three salary brackets, employees who earn less than $25,000 per year, those who earn between $25,000 and $50,000, and those who earn $50,000 or more. The employee contribution is not set out in the booklet but is found on the enrollment form that employees must access through the Internet. Shop Steward Arnold's weekly contribution for basic health insurance increased $8.31 per week for the same level of coverage, his weekly dental insurance contribution increased $1.65, and his vision insurance increased by 27 cents.

Prior to 1996, although the collective-bargaining agreements contained no provision relating to health insurance, unit employees had received the same benefits as non-represented employees. The agreement in effect from August 19, 1996, to August 18, 1999, in article XXXIII, provides, in pertinent parts, as follows:

> The Company agrees to continue in effect for the term of this Agreement a program of health insurance plans on the same terms as are in effect for employees not represented by a labor organization. Any changes (benefits and premiums) in such plans shall be on the same basis as for non-represented CJ [Courier Journal] employees.

Upon its expiration, the Union proposed that the foregoing collective-bargaining agreement be extended, but the Newspaper "was not interested in extending the agreement."

The Union did not seek to bargain about and did not protest various changes in health care benefits and employee contributions that were made during the term of the agreement. Nor did the Union protest or seek to bargain about changes in the benefit plans or increases in employee contributions following the expiration of the collective-bargaining agreement until it filed the charge herein on January 29, 2003. Following the expiration of the collective-bargaining agreement on August 18, 1999, employee contributions were increased effective July 1, 2000, July 1, 2001, January 1, 2002, and January 1, 2003.

2. Analysis and concluding findings

There is no contention that the increase in unit employee contributions would not, in ordinary circumstances, be a mandatory subject of bargaining. The Government argues that the Newspaper presented the Union with a fait accompli and that its actions violated the Act.

The Newspaper argues that it did not violate the Act because a "dynamic status quo" has been established by the language of the expired collective-bargaining agreement and the history of the parties, specifically the absence of any protest or grievance when changes were made in the past. In view of this "dynamic status quo," the Newspaper argues that a traditional waiver analysis is inapplicable.

The Newspaper argues that the collective-bargaining agreement established the status quo and that, in these circumstances, a traditional waiver analysis is not applicable. The language to which the parties agreed does not support that argument. The collective-bargaining agreement specifically provides that the agreement with regard to continuation of health insurance plans is "to continue in effect for the term of this Agreement." It is well established that waivers contained in collective-bargaining agreements do not survive the expiration of those agreements. *Ironton Publications*, 321 NLRB 1048 (1996). The Newspaper admits that, despite the request of the Union to extend the collective-bargaining agreement herein, it declined to do so. *Rockford Manor Care Facility*, 279 NLRB 1170 (1986), cited in the Newspaper's brief, is inapposite. In that case the changes in health benefits occurred during the term of the collective-bargaining agreement, and the Board affirmed the administrative law judge's finding that the contractual language to which the union agreed "waived its interest in bargaining with respect to carrier-induced changes in the health benefit plan." Id at 1174.

Regarding continuation of a purported “dynamic status-quo,” the Newspaper, citing *Maple Grove Health Care Center*, 330 NLRB 775 (2000), argues that it maintained the status quo and that the status quo in this case is “the same package of health insurance benefits at the same costs as non-unit employees.”

The foregoing argument is too broad a reading of the principle discussed in *Maple Grove*, and it does not acknowledge that the predicate for finding a status quo is the absence of discretion. Thus, as in *The Post Tribune Co.,* 337 NLRB 1279 (2002), it is clear that whatever changes are instituted pursuant to a dynamic status quo must be changes that “followed a well-established past practice.” Id. at 1280. In that case, the record established a consistent past practice of allocation of insurance premium increases pursuant to a specific formula. In the instant case, there is no such uniform past practice. Indeed, the record does not establish what percentage of the health insurance premiums are being paid by employees and the employer respectively. The allocation is discretionary. In *Eugene Iovine, Inc.,* 328 NLRB 294 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001), in addressing a discretionary reduction in employee working hours, the Board stated: “The Board and the courts have consistently held that such discretionary acts are . . . ‘precisely the type of action over which an employer must bargain.”’

> The Newspaper’s argument that it could act unilaterally because the Union had not protested or requested bargaining regarding prior changes is not supported by Board precedent. [U]nion acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past.” *Exxon Research & Engineering Co.,* 317 NLRB 675, 685–686 (1995).

The Board, in *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001), explained that “[t]he issues of “fait accompli,” “request to bargain,” and “waiver” are related in the sense that a finding of fait accompli will prevent a finding that a failure to request bargaining is a waiver.” Id. at 1023. The Board then cites the following principle stated in *Ciba-Geigy Pharmaceutical Division,* 264 NLRB 1013, 1017 (1982):

> The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli.

In this case, there was no communication with the Union. The Union learned of the impending change in employee contributions from Shop Steward Arnold who, as an employee, received the enrollment information in the mail. Any contention that the increase was not a “done deal,” as President Smith characterized it, or that the employer had any “intention of changing is mind” is belied by the direction to employees to access the enrollment form on the internet which would display the employee contribution based on that employee’s salary bracket.

Virtually the same issues that are present in this case were litigated in 2002 before Administrative Law Judge Paul Bogas. That case, which is pending before the Board, arose at this same location and addresses the Newspaper’s increase in employee health insurance contributions in July 2001 and its announcement on September 24, 2001, that contributions would increase on January 1, 2002. Following those increases, Graphic Communications International Union, Local 619–M, AFL–CIO filed an unfair labor practice charge against the Newspaper. Judge Bogas heard the case on September 9, 2002. In his decision, JD-123–02, dated November 7, 2002, Judge Bogas found that the Newspaper had violated the Act with regard to the allegations of unilateral changes occurring after the Section 10(b) date of September 15, 2001. In his decision, Judge Bogas cites applicable precedent, including the precedent cited above, and concluded that the Newspaper violated the Act. I do likewise. The Newspaper, by unilaterally, without notice to or bargaining with the Union, increasing employee contributions for health insurance, violated Section 8(a)(5) of the Act.

Conclusions of Law

1. By failing and refusing to provide the Union with requested relevant information, the Newspaper has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By unilaterally, without giving the Union timely notice or an opportunity to bargain, increasing unit employees’ contributions for health insurance, the Newspaper has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Newspaper has engaged in certain unfair labor practices. I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Newspaper having unlawfully failed to provide the Union with the relevant information it requested reflecting the job descriptions of employees in the technology, news, and circulation departments, together with the wage rates for employees performing those jobs, it must provide the foregoing relevant information.

The Newspaper having unilaterally increased unit employees’ contributions for health insurance, it must rescind those increases and make unit employees whole for any such cost increase from January 1, 2003, until it negotiates in good faith with the Union to agreement or to impasse. The reimbursement to employees of any increased costs shall be with interest as prescribed in *Florida Steel Corp.,* 231 NLRB 651 (1977). The Newspaper must also reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from its unilateral changes, with interest as prescribed in *Florida Steel Corp.,* supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Newspaper, The Courier-Journal, a Division of Gannett Kentucky Limited Partnership, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Communications Workers of America, Local 3310, AFL–CIO, as the exclusive representative of all journeymen employed in the Newspaper's composing Room by failing to provide the Union with the relevant information it requested reflecting the job descriptions of employees in the technology, news, and circulation departments, together with the wage rates for employees performing those jobs.

(b) Unilaterally, without giving the Union timely notice or an opportunity to bargain, increasing unit employees' contributions for health insurance.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the relevant information that it requested regarding the job descriptions of employees in the technology, news, and circulation departments, together with the wage rates for employees performing those jobs.

(b) Rescind the increases in unit employees' contributions for health care insurance.

(c) Make whole all unit employees for the increased cost of health insurance, with interest, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Newspaper's authorized representative, shall be posted by the Newspaper immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Newspaper to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Newspaper has gone out of business or closed the facility involved in these proceedings, the Newspaper shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Newspaper at any time since October 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Newspaper has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 10, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT refuse to bargain with Communications Workers of America, Local 3310, AFL–CIO, as the exclusive representative of all journeymen employed in the composing room by failing to provide the Union with the relevant information it requested reflecting the job descriptions of employees in the technology, news, and circulation departments, together with the wage rates for employees performing those jobs, and we will provide that information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT unilaterally, without giving the Union timely notice or an opportunity to bargain, increase unit employees contributions for health insurance.

WE WILL rescind those increases and make whole all unit employees for the increased cost of health insurance, with interest, in the manner set forth in the remedy section of the decision.

THE COURIER-JOURNAL, A DIVISION OF GANNETT KENTUCKY LIMITED PARTNERSHIP

---

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."